No. 22184

United States
COURT OF APPEALS
for the Ninth Circuit

JUDITH ANN LIBERIAN TRANSPORT CORPORATION, LTD., a foreign corporation,
Defendant and Third Party Plaintiff-Appellant,

v.

WAYNE CRAWFORD,
Plaintiff-Appellee,

BRADY HAMILTON STEVEDORE COMPANY, a corporation,
Third Party Defendant-Appellee.

BRIEF OF PLAINTIFF-APPELLEE

Appeal from the Final Judgment of the United States District Court for the District of Oregon

THE HONORABLE ROBERT C. BELLONI, Judge

POZZI, LEVIN & WILSON
RAYMOND J. CONBOY
808 Standard Plaza
Portland, Oregon 97204
Attorneys for Plaintiff-Appellee Wayne Crawford

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE.

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STATEMENT OF JURISDICTION

The plaintiff filed this action on October 4, 1966, in the United States District Court for the District of Oregon (R. I, 1). Diversity of citizenship was alleged in the complaint, admitted by answer, and

set forth as an agreed fact in the pretrial order (R. I, 1, 3, 12). It was also alleged in the complaint, admitted by answer, and set forth as an agreed fact in the pretrial order that the amount in controversy exceeded the sum of $10,000, exclusive of interest and costs (R. I, 1, 3, 12). Accordingly, the District Court had jurisdiction of the cause between plaintiff and defendant by virtue of 28 USCA § 1332.

On November 15, 1966, the defendant filed a third-party complaint against Brady-Hamilton Stevedore Company alleging facts which, if proved, would entitle defendant to indemnification from the third-party defendant for any damages recovered by the plaintiff (R. I, 5). Jurisdiction of the District Court over the subject matter of the third-party complaint was based upon 28 USCA § 2072 and Rule 14 of the Federal Rules of Civil Procedure.

The plaintiff's action against the defendant and the defendant's action for indemnity against the the third-party defendant were both tried before the Honorable Robert C. Belloni, sitting with a jury, on June 13 and 14, 1967. The jury returned a verdict for damages in favor of the plaintiff and against defendant and by a separate verdict found that the defendant was not entitled to indemnity from Brady-Hamilton Stevedore Company (R. I, 81, 82). Judgment was entered on both verdicts on June 14, 1967 R. I, 85).

On June 26, 1967, the defendant filed a motion for judgment notwithstanding the verdict or in the

alternative for a new trial against both the plaintiff and the third-party defendant (R. I, 86). The defendant's motion was denied by order of the District Court entered on July 10, 1967 (R. I, 93). The defendant thereafter filed timely notice of appeal on August 8, 1967 (R. I, 95) pursuant to Rule 73(a), Federal Rules of Civil Procedure.

Accordingly, this Court has jurisdiction to review the judgment of the District Court under the provisions of 28 USCA § 1291.

STATEMENT OF THE CASE

A. Preliminary Statement.

This appeal involves two incompatible lawsuits which, at the defendant's election, were tried before one jury. The plaintiff-appellee, a longshoreman, sued the defendant shipowner for injuries caused by unseaworthiness of the vessel which he was employed in unloading. The shipowner impleaded the stevedore, denying that the ship was unseaworthy, but contending that any unseaworthiness found to exist was caused solely by the stevedore's negligence and violation of contractual duty. On this appeal, the defendant challenges the judgment entered upon jury verdict, which: (1) imposed liability and damages and (2) refused indemnity. It is solely with the first aspect of the judgment that the plaintiff-appellee is concerned. Accordingly, we believe that the statement of the case demands a somewhat different emphasis

than supplied by the defendant, and substitute the following statement.

B. Nature of the Action.

The plaintiff brought this action for personal injuries which he suffered while unloading cargo from the hold of the vessel JUDITH ANN, owned by the defendant Judith Ann Liberian Transport Corporation, Ltd. Steel rods, being lifted at one end by a cradle-type pickup sling, slipped from the sling and hurled a large block of wood into the plaintiff's face and eye.

The plaintiff proceeded solely upon a theory of unseaworthiness. His contentions, set forth in the pretrial order, were as follows:

> "1. . . . the cargo which plaintiff was required to discharge was improperly stowed, in that it was not properly blocked, in that the dunnage was insufficient and inadequate, in that it was necessary to use a pickup sling in order to discharge it, and in that it was so located that it could not be safely discharged.
>
> 2. . . . the pickup sling being used to discharge the vessel was not provided with a proper hook or other securing device to keep it from slipping." (R. I, 13).

The defendant denied liability, and in turn alleged that plaintiff was contributorily negligent in certain particulars (R. I, 14). In addition the defendant impleaded Brady-Hamilton Stevedore Company, asserting that the defendant was entitled to in-

demnity from the stevedore if required to pay damages to the plaintiff (R. I, 5, 14, 15).

C. Summary of Facts.

The vessel JUDITH ANN is a tramp freighter of Liberian registry which, at the time of the plaintiff's injury, was being operated under a time charter by Shinto Corporation, a Japanese company (R. IV, 219, 220). The vessel had picked up a cargo of steel at Yawata, Japan, which was being unloaded onto the dock at Portland, Oregon (R. IV, 220, 223, 225, 228, 229).

The plaintiff, who was fifty-two years of age at the time of trial, began working as a longshoreman upon graduation from high school, and when injured was working as a holdman, carrying cargo and slinging loads (R. III, 5-8). On May 3, 1966, the plaintiff was working in the hold at the No. 4 hatch of the JUDITH ANN (R. III, 51). His gang was engaged in unloading bundles of "rebar" or "reinforcing" steel, limber steel rods approximately twenty feet in length (R. III, 58, 59, 79, 117, 159; R. IV, 234, 252). The cargo was being hoisted from the hold to the dock by dockside gantry, or "whirly", cranes. The ship's winches and booms were not in use (R. IV, 53).

Four longshoremen, two walking bosses, a supercargo, and a ship's master and cargo surveyor testified that the rebar steel was improperly stowed (R. III, 51, 58-61, 76, 81, 114, 116, 125, 126, 129, 132-

134, 142, 143; R. IV, 178, 182, 190, 192, 197, 198, 237, 242-244). According to these witnesses, flexible steel rods should be and generally are stowed in tiers on 4 x 4 inch pieces of wooden dunnage. This is horizontal blocking. Dunnage also separates the steel vertically at convenient intervals. This kind of stow permits the holdmen to get heavy hoisting slings around the bundles of steel without resorting to the use of pickup slings or other makeshifts to get the bundles into position where hoisting slings can be put around them (R. III, 59, 60, 72, 76, 81, 116, 129, 132, 134-136, 142, 143, 157, 169; R. IV, 182, 190, 197, 198, 242-244). An average load for hoisting would number seven or eight bundles of steel rods (R. III, 61). The JUDITH ANN was not using 4 x 4 inch dunnage. The only dunnage consisted of some short, broken up pieces of wood, estimated to be between one-quarter and one inch in thickness (R. III, 60, 76, 116; R. IV, 182, 197, 231). Dunnage is purchased by the ship, and four-by-four inch blocks are more expensive than scrap wood (R. III, 133; R. IV, 183). The large blocks are available in Japan (R. III, 133; R. IV, 187, 233). Lack of proper dunnage aboard the JUDITH ANN prevented hoisting slings from being worked under and around the bundles of steel (R. III, 58-61, 76-77, 116).

In order to get hoisting slings in place it was necessary to raise one end of the steel rods by means of a "pickup" sling. A "cradle" sling was being used for this purpose. This was described as a wire sling with an eye spliced in either end, which is worked under

one end of the load to be picked up, and attached by the eyes to the crane hook (R. III, 61-63, 72, 81; R. IV, 190, 239). In order to force the cradle sling a few inches under one end of the bundled steel, the plaintiff's gang used prying bars. The sling was then tightened by the crane and generally worked under the load a few inches more (R. III, 61, 62). The next step was to lift the load three or four feet at the secured end while the holdmen attached hoisting slings (R. III, 61, 62, 63, 79, 81). Before approaching the sagging load, the men would wait for a few seconds to determine that the lift was stable (R. III, 62, 63; R. IV, 217).

The plaintiff's gang had been discharging other cargo from the No. 4 hatch in the morning, and began to work on the steel rods at about 1:00 p.m. (R. III, 52, 53). One load of steel bundles had been removed from the hold and the longshoremen were working on the second load when the plaintiff was injured (R. III, 53). One end of the second load of steel bars had been raised to a height of three or four feet with the pickup sling in preparation for putting hoisting slings around the load (R. III, 62, 63). The load rested in the cradle of the sling for a short time, when several of the rods started to slip out, followed by the whole load (R. III, 63, 80, 117; R. IV, 213, 214). The falling steel struck a four-by-four inch timber, hurling it against the plaintiff's face and forearm (R. III, 80; R. IV, 214).

There was testimony that use of a cradle type

pickup sling was improper. Witnesses testified that one or more varieties of "choker" sling, designed to tighten on the load as it is raised, were available and should have been used even though no sling used for pickups is completely safe (R. III, 83, 165, 167, 168, 169; R. IV, 190, 191, 198, 230, 242, 243, 244).

According to the plaintiff's witnesses, a cradle-type pickup sling was dangerous because, at best, the steel rods against the steel sling presented a slippery condition, which was aggravated by the flexibility of the rods (R. IV, 189-191, 229, 230, 242, 243). Witnesses testified that there is always some slight movement of the ship while it is berthed at the dock (R. IV, 244). Steel was being discharged from the No. 3 hatch at the same time that the plaintiff was working in the No. 4 hatch, and lifting of steel from the hold, especially when done by a shore based gantry crane, causes the vessel to lurch slightly (R. IV, 229).

The defendant called only one expert witness, the supercargo of the JUDITH ANN, who was willing to testify that in his opinion the stow was proper, although on cross-examination he admitted that better blocking could have been used and that it is dangerous to use a pickup sling (R. IV, 222, 226, 229, 230). Otherwise the defense consisted largely of cross-examining the plaintiff's witnesses to determine that they had, from time to time, unloaded other steel ships with dunnage of a kind similar to that used on the JUDITH ANN (R. III, 70, 82, 86, 146, 157; R. IV, 186, 203, 241). We have already observed that

these witnesses uniformly testified such a stow was improper and dangerous.

The plaintiff suffered severe injuries. One eye was crushed and had to be removed (R. III, 12, 106-108). There was facial disfigurement which, even after surgery, was quite marked and will be permanent (R. III, 11, 12, 40-47). As a direct result of his injury, the plaintiff developed a condition of thrombophlebitis in his right leg, which resulted in a permanent venous insufficiency. The plaintiff was unable, at the time of trial, to walk more than one block at a time, required continuing medical treatment with anticoagulant drugs, and risked further serious injury to the leg in the event of any minor trauma (R. III, 16, 17, 91-98). The plaintiff also suffered a brain concussion, with continual noises in his head, headaches, dizziness and memory loss (R. III, 14-16). A physician identified this condition as post-traumatic head syndrome, which would tend to clear as time went on, although the doctor could not say to what extent (R. III, 22, 24-30, 31, 32). As a consequence of his injuries, the plaintiff is permanently disabled from returning to work on the waterfront (R. III, 28).

D. Nature of the Judgment.

The jury returned a verdict in favor of the plaintiff against the defendant in the sum of $194,058.55. No motion for remititur was made below, and no party to this appeal contends that the amount of the

judgment was excessive in light of the plaintiff's injuries. The jury also found that the defendant was not entitled to indemnity from the stevedore (R. I, 82). Judgment was entered upon both verdicts (R. I, 85).

E. Questions Presented on Appeal.

With respect to the defendant's appeal from the judgment in favor of the plaintiff, the plaintiff accepts the statement found in the Appellant's Brief that ". . . the questions presented concern the propriety of the District Court's action in giving certain of the plaintiff's requested instructions, and in refusing to give certain instructions requested by shipowner." (App. Br. 5). The plaintiff, of course, takes no position with respect to the defendant's indemnity claim against the stevedore.

SUMMARY OF ARGUMENT

The defendant contends that the court erred in giving two instructions requested by the plaintiff and in failing to give two instructions requested by the defendant.

The instructions given were correct statements of applicable law and were amply supported by evidence. Furthermore, a consideration of the instructions as a whole shows that the jury could not have been misled even if the defendant were correct (as it was not) in asserting that the requested instructions contained isolated words or phrases likely to produce confusion.

The defendant's requested instructions were both wrong and the lower court would have committed prejudicial error had it given either of them. One of the requested instructions would have told the jury that a shipowner cannot be held liable for an unseaworthy stow if the stevedore uses customary methods of unloading the vessel, thereby creating an unreasonable risk to the workmen because of the improper stow, when other and safer methods of discharge were *available* but not actually *used* by the stevedore. The other requested instruction would have directed the jury to find as a matter of law that the stow was not unseaworthy, although the evidence of an improper stow was virtually conclusive and the court would have been justified in setting aside a verdict for the defendant as being against the weight of the evidence.

ARGUMENT

The following discussion is in answer to that portion of the plaintiff's argument entitled "Plaintiff's Claim Against Ship Owner" set forth at pages 17 through 27 of the Appellant's Brief.

1. The trial court did not err in giving the plaintiff's Requested Instruction No. 7.

The instruction was as follows:

> "I instruct you that the shipowner is liable for unseaworthiness, regardless of negligence, whenever the ship or its gear is not reasonably

fit for the purpose for which it was intended. This liability extends to longshoremen who work aboard the vessel and employ contracting stevedore companies. Even if the owner engaged others, such as the stevedore companies who supply equipment necessary for stevedoring operations, he must still answer to a longshoreman if the gear proves to be unseaworthy.

I further instruct you that *if the injuries to the plaintiff were caused by some malfunctioning in the rigging used for unloading the vessel* or by some defect in the equipment used, or if there was improper use of the equipment by other longshoremen, the shipowner would be liable to the plaintiff for unseaworthiness. The obligation of providing seaworthy equipment is absolute and extends to all loading or unloading equipment used on the vessel." (R. IV, 278-279). (Italics added)

The defendant contends it was error to give that portion of the charge italicized above, for the reason that "malfunctioning in the rigging was not one of the specifications of unseaworthiness charged by plaintiff, nor was there any evidence that plaintiff's accident was caused by any such malfunctioning of the rigging. This instruction, in effect, advised the jury that it could make a finding of unseaworthiness on a specification neither alleged nor proved" (App. Br. 17).

The challenged instruction was not abstract or inapplicable to the issues and proof. The plaintiff contended, and there was evidence to support his con-

tention, that the vessel was unseaworthy because the pickup sling "was not provided with a proper hook or other securing device to keep it from slipping." (R. I, 13). This was, in effect, an allegation that the unloading gear was improperly rigged. Slipping of the steel bars from the pickup sling constituted a "malfunction" of the rigging in a very real sense.

Moreover, this Court, in common with other jurisditions, is firmly committed to the view that the court's instructions to the jury must be read as a whole to determine if any particular instruction was prejudicial. Abstract instructions, even incorrect statements of the law, can be cured by the remainder of the charge. *Jesonis* v. *Oliver J. Olson & Co.*, 238 F.2d 307 (C.A. 9, 1956); *Van Camp Seafood Co.* v. *Nordyke*, 140 F.2d 902 (C.A. 9, 1944); *Bohle* v. *Matson Navigation Co.*, 243 Or. 196, 412 P.2d 367 (1966); *Fields* v. *Fields*, 213 Or. 522, 307 P.2d 528, 326 P.2d 451 (1958). "Even if a single instruction is erroneous, it does not call for reversal if it is cured by a subsequent charge or by a consideration of the entire charge." *Sunkist Growers, Inc.* v. *Winckler and Smith Citrus Products Co.*, 284 F.2d 1 (C.A. 9, 1960).

Prior to the instruction complained of, the Court instructed the jury as follows:

> "It is desirable that we first consider the action of Mr. Crawford against the steamship company, because how you decide that case will determine whether you reach the steamship company's action against the stevedoring company.

The plaintiff, Mr. Crawford, bases his claim upon unseaworthiness. He contends that the vessel JUDITH ANN, owned by the defendant, was unseaworthy in two respects. The first is, and I am quoting from the plaintiff's statement and contention, 'In that the cargo which plaintiff was required to discharge was improperly stowed, in that it was not properly blocked, in that the dunnage was insufficient and inadequate, in that it was necessary to use a pickup sling in order to discharge it, and in that it was so located that it could not be safely discharged.'

I instruct you that to be in a seaworthy condition means the cargo must be stowed in a condition reasonably suitable and fit for safe discharge from the vessel. The shipowner is not obligated to furnish an accident free ship. The standard is not perfection, but reasonable fitness.

The second contention is that, 'The pickup sling being used to discharge the vessel was not provided with a proper hook or other securing device to keep it from slipping.'

In order to recover on this claim, the plaintiff must prove by a preponderance of the evidence that the pickup sling in question was not reasonably suitable and fit for the intended purpose for which it was provided. The shipowner is not obligated to furnish or to have furnished a pickup sling, but it must be a reasonably fit one in light of the purpose for which it is to be used, giving due regard to the safety of the longshoremen.

In this case, the burden is on the plaintiff to establish by a preponderance of the evidence the

following facts: First, that the vessel was unseaworthy at the time and place in question in one of the particular respects which I have read to you. Second, that the unseaworthy condition was a proximate cause of some injury and consequent damage sustained by the plaintiff. . . .

[The Court then instructed the jury on the doctrine of unseaworthiness and continued:]

To apply the instruction I have just given you regarding unseaworthiness specifically to this case, if you find that the stowage of the cargo was improper and not in accordance with a reasonably safe and seaworthy manner of stowing the cargo, either by reason of the fact that the steel cargo which plaintiff was required to discharge was not properly blocked or was separated by insufficient or inadequate dunnage, or because it was necessary to use a pickup sling in order to discharge it, or because it was so located that it could not be safely discharged, then you will find that the vessel was unseaworthy by reason of said unsafe stowage, even if you find that there was nothing wrong with the vessel as such.

If you further find that by reason of this unsafe condition of stowage of the cargo which rendered the vessel unseaworthy, it became necessary to use a more dangerous method of unloading the cargo, and that plaintiff was injured as a proximate result thereof, then you will return your verdict in favor of the plaintiff and against the defendant." (R. IV, 274-278).

Immediately after giving these instructions, the Court gave the instruction upon which error is predicated.

The instructions, taken as a whole, made it perfectly clear to the jury that a finding of unseaworthiness had to be predicated on improper stowage or use of an improper pickup sling. The defendant's first specification of error has no merit.

2. The trial court did not err in giving plaintiff's Requested Instruction No. 8.

This instruction is as follows:

> "You are instructed that the duties imposed upon the shipowners and the law in respect to the safety of employees are nondelegable; that is to say, the employer cannot delegate the performance of those duties to any other agent or employee. The defendant in this case cannot absolve itself of the performance of those duties, nor could it delegate the performance of them to employees, to the stevedore company nor to anyone else, but they adhere to the defendant shipowner without the possibility of suspension or interruption." (R. IV, 279; App. Br. 7).

The defendant's position on appeal is that: "The Court, in defining 'non-delegable,' mistakenly instructed that Shipowner could not delegate the *performance* of the duties in question to Stevedore or anyone else. Although it is true that the vessel owner cannot avoid the *responsibility* imposed upon it by such duties, there is no prohibition to the delegation of their performance. . . . The instruction had the effect of advising the jury that Shipowner's conduct in this respect was prohibited by law." (App. Br. 19).

The requested instruction was limited by its own terms to duties "in respect to the safety of employees." The instruction did no more than advise the jury that a shipowner cannot divest himself of the duty to provide a safe ship. The language does not even suggest that a shipowner cannot hire a stevedore to unload the vessel.

The lower court accurately disposed of the defendant's contention on this score when it said: "The defendant's exception in which Mr. Carlsen took one-half of one of my sentences and took it to be telling the jury that it was in some way unlawful for the shipowner to hire a stevedore, certainly, that would be a faulty instruction. *But I don't think anyone in this room has any idea that the jury may feel that this is the case.*" (R. IV, 300).

We have earlier quoted the instructions in which the court summarized the plaintiff's contentions of unseaworthiness and told the jury that recovery would have to be based on proof of such contentions. In addition, the court instructed at length, with respect to the third-party action for indemnity, upon the correlative duties of the shipowner and stevedore (R. IV, 285-289). It was assumed throughout those instructions that the shipowner had a right to hire a stevedore. No suggestion was made during the trial that it was in any way improper for the shipowner to employ longshoremen to unload the cargo. There was, in fact, testimony of the practice within the shipping industry for the ship's agent to hire a

master stevedore (R. IV, 212, 217, 218), and for the supercargo and ship's mate to supervise and oversee the work of longshoremen in unloading the vessel (R. III, 138-140; R. IV, 224).

The purpose of the requested instruction was to advise the jury that responsibility for unseaworthiness rests upon the shipowner, even though someone other than the shipowner may be at fault for creating the unsafe condition. *Johnson Line* v. *Maloney*, 243 F.2d 293 (C.A. 9, 1957); *Lahde* v. *Soc. Armadora Del Norte*, 220 F.2d 357 (C.A. 9, 1955). It was not the purpose of the instruction to suggest that a shipowner may not hire longshoremen. In view of the instructions and testimony as a whole, there is no possibility that the jury could have understood it to mean this. *Jesonis* v. *Oliver J. Olson & Co.*, 238 F.2d 307 (C.A. 9, 1956).

3. The trial court did not err in refusing to give defendant's Requested Instruction No. 24.

Defendant's Requested Instruction No. 24 was as follows:

> "The plaintiff contends in this case that the ship was unseaworthy because of improper stowage of cargo. I instruct you that the method or manner of cargo stowage renders a vessel unseaworthy only when it results in an unreasonable hazard to the safety of the men required to work in and around the cargo. The mere fact that a particular manner of stowage requires more effort in order to discharge the cargo, or

> requires the use of other and different equipment than may be customarily used for cargo discharge, does not make the vessel unseaworthy so long as methods and equipment are available which can be used to discharge the cargo without undue or unreasonable risk to the safety of those performing the work." (R. I, 72; App. Br. 7).

In support of the foregoing instruction, defendant argues in its brief: "The above requested instruction embodied one of the principal elements of Shipowner's theory of the case—i.e. that the cargo stow in question was in keeping with the usual and customary practice and that it did not pose any unreasonable risk of harm to the longshoreman engaged in the discharge *if proper methods and equipment were utilized by the master stevedore.*" (Italics are those of the defendant) (App. Br. 21).

The court would have committed prejudicial error had it given this instruction. It is not the *availability* of safe methods or equipment but the extent of their actual use aboard the ship which determines whether the vessel is seaworthy or unseaworthy. *Mahnich* v. *Southern Steamship Co.*, 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 561 (1944); *Waldron* v. *Moore-McCormick Lines, Inc.*, 386 U.S. 724, 87 S. Ct. 1410, 18 L. Ed. 2d 482 (1967). If the plaintiff's requested instruction is correct, a longshoreman rarely, if ever, could predicate a claim for injuries upon a bad stow or the master stevedore's use of dangerous procedures or equipment. However, the maincurrent of admiralty law has been to expand, not eliminate, the doctrine

of unseaworthiness in these areas. *Gutierrez* v. *Waterman Steamship Corp.*, 373 U.S. 206, 83 S. Ct. 1185, 10 L. Ed. 2d 297 (1963); *Petterson* v. *Alaska Steamship Co.*, 347 U.S. 396, 75 S. Ct. 601, 98 L. Ed. 798 (1953); *Huff* v. *Matson Navigation Co.*, 338 F.2d 205 (C.A. 9, 1964). Indeed, since *Mascuilli* v. *United States*, 387 U.S. 237, 87 S. Ct. 1705, 18 L. Ed. 2d 743 (1967), the momentary negligent act of a fellow stevedore is sufficient to render the vessel liable for resulting injuries upon a theory of unseaworthiness. See *Candiano* v. *Moore-McCormick Lines, Inc.*, 382 F.2d 961 (C.A. 2, 1967).

In view of the inaccuracy of the requested instruction, it is not necessary to review the testimony claimed to support the instruction. We think it fair, however, to observe that just as the defendant's requested instruction does not correctly reflect applicable law, so also is its summary of the facts far from being an accurate reflection of the record. It is not true that "from the plaintiff's own witnesses it appears that whatever danger existed during the course of the discharge of this cargo was the direct result, not of the manner of stowage, but of the methods and equipment used in the discharge operation." (App. Br. 22). Witness Carl Sloan, a supercargo called by the plaintiff, testified that the use of any pickup sling to discharge steel is a dangerous procedure, but is necessary when the dunnage is inadequate to enable workmen to get hoisting slings around the loads as they lay on the floor of the hold (R. IV, 189-191). The witness testified that whenever it was

necessary to use a pickup sling, "The men tried to use a choker type of sling that bites around the load and increases the bite as the strain is put on by the gear, the lifting gear, to try to prevent the pickup sling from moving. But it's never really safe." (R. IV, 190, 191). The defendant's own expert witness, supercargo Winston B. Anderson, testified that a pickup sling, when used on steel, is in danger of slipping (R. IV, 229, 230).

It is not error to refuse a requested instruction which is partially incorrect. *Baltimore & Ohio Railroad Co.* v. *Felgenhauer*, 168 F.2d 12 (C.A. 8, 1948). However, to the extent that the defendant's requested instruction correctly stated the law, it was fully covered by the court's charge. The court instructed as follows:

> "The plaintiff, Mr. Crawford, bases his claim upon unseaworthiness. He contends that the vessel JUDITH ANN, owned by the defendant, was unseaworthy in two respects. The first is, and I am quoting from the plaintiff's statement and contentions, 'in that the cargo which plaintiff was required to discharge was improperly stowed, in that it was not properly blocked, in that the dunnage was insufficient and inadequate, in that it was necessary to use a pickup sling in order to discharge it, and in that it was so located that it could not be safely discharged.'
>
> I instruct you that to be in a seaworthy condition means the cargo must be stowed in a condition *reasonably suitable and fit*, for safe discharge from the vessel. The shipowner is not ob-

ligated to furnish an accident-free ship. The standard is not perfection, but *reasonable fitness.*

The second contention is that, 'the pickup sling was being used to discharge the vessel was not provided with a proper hook or other securing device to keep it from slipping.'

In order to recover on this claim, the plaintiff must prove by a preponderance of the evidence that the pickup sling in question was not *reasonably suitable and fit* for the intended purpose for which it was provided. The shipowner is not obligated to furnish or to have furnished a pickup sling, but it must be a *reasonably fit* one in light of the purpose for which it is to be used, *giving due regard to the safety of the longshoremen.*

. . . . .

Under the Maritime Law, every shipowner or operator owes to every longshoreman employed aboard a vessel the duty to keep and maintain the ship and stowage in a seaworthy condition at all times. To be in a seaworthy condition means to be in a condition *reasonably suitable and fit* for the purpose or use for which provided or intended. . . .

. . . . .

To apply the instruction I have just given you regarding unseaworthiness specifically to this case, if you find that the stowage of the cargo was improper and not in accordance with the *reasonably safe and seaworthy manner* of stowing the cargo, either by reason of the fact that the steel cargo which plaintiff was required to discharge was not properly blocked or was sep-

arated by insufficient or inadequate dunnage, or because it was necessary to use a pickup sling in order to discharge it, or because it was so located that it could not be safely discharged, then you will find that the vessel was unseaworthy by reason of said unsafe stowage, even if you find that there was nothing wrong with the vessel as such.

If you further find that by reason of this unsafe condition of stowage of the cargo which rendered the vessel unseaworthy, it became necessary to use a more dangerous method of unloading the cargo, and that plaintiff was injured as a proximate result thereof, then you will return your verdict in favor of the plaintiff and against the defendant.

I instruct you that the shipowner is liable for unseaworthiness, regardless of negligence, whenever the ship or its gear is not *reasonably fit* for the purpose for which it was intended. . . ." (R. VI, 274-278).

Again and again in the course of the foregoing charge the Court instructed that the standard by which the jury was to measure the seaworthiness of the stow and equipment was that of "reasonable fitness." The test formulated by the court was proper (See *Blassingill* v. *Waterman Steamship Corp.*, 336 F.2d 367, 370, ftn. 4(C.A. 9, 1964)) although it put the substance of the unobjectionable portions of the requested instruction in terms somewhat different than those suggested by the defendant. It is not error to refuse a requested instruction if its substance is

set forth in the instructions given. *Southern Pacific Company* v. *Souza*, 179 F.2d 691 (C.A. 9, 1950); *Van Camp Seafood Co.* v. *Nordyke*, 140 F.2d 902 (C.A. 9, 1944).

It is true that a party is entitled to have his theory of the case presented by appropriate instructions, subject, however, to the qualification that his theory must comply with the law. *Blassingill* v. *Waterman Steamship Corp.*, supra, 336 F.2d 367 (C.A. 9, 1964). To the extent that the defendant's Requested Instruction No. 24 was a correct statement of applicable law, it was included in the instructions given to the jury.

4. The trial court did not err in refusing to give the defendant's Requested Instruction No. 25.

This request was as follows:

> "I instruct you that the fact that cargo is stowed in such a manner as to require the use of a pickup sling in order to discharge it does not render the vessel unseaworthy." (R. I, 73; App. Br. 8).

The basis for this requested instruction is set forth in the Appellant's Brief as follows:

> "Shipowner requested this instruction in line with its theory that the cargo stowage here in question was not the source of the danger which led to plaintiff's accident and that, if any undue hazards were presented during the unloading operations, they were created by the discharge method and appliances chosen by Stevedore.

> There was no evidence presented which would support the proposition that the employment of any type of pickup sling, under any and all circumstances and no matter how carefully used or what precautions taken, creates an unreasonable risk or hazard." (App. Br. 26).

The requested instruction directed the jury to find against the plaintiff upon the issue of an improper stow. It would have been reversible error to give such an instruction. The evidence strongly preponderated in favor of liability on this issue to the extent, in fact, that the court would have been justified in setting aside a verdict for the defendant as against the weight of the evidence. 6A Moore's Federal Practice § 59.08(5). No fewer than eight witnesses (one of them called by Brady-Hamilton Stevedore Co.) testified that the stow of rebar steel was improper and that it presented a hazard to longshoremen engaged in unloading the cargo (R. III, 59, 60, 72, 76, 81, 116, 129, 132, 134-136, 142, 143, 157, 169; R. IV, 182, 190, 197, 198, 242-244). The sole expert witness called by the defendant testified that better blocking could have been used (R. IV, 229, 230). There was testimony that a pickup sling had to be used to raise the steel three or four feet from the floor of the hold in order to get hoisting slings into position (R. III, 62, 63, 79-81, 116, 117). As noted in our discussion of the appellant's previous assignment of error, there was also testimony that it is dangerous to lift steel bars with any kind of pickup sling, although a choker type sling is preferable to a crade type sling

(R. IV, 190, 191). In fact, the expert witness called by the defendant, supercargo Winston B. Anderson, testified as follows:

> "QUESTION: Now, the use of a pickup sling on steel, flexible steel, at best renders it dangerous, doesn't it, because it can slip?
>
> ANSWER: There is always that possibility of it slipping." (R. IV, 229, 230)

There was, in short, ample evidence that rebar steel stowed in such a manner as to require the use of a pickup sling to discharge it rendered the vessel unseaworthy. Even if the stevedore could arguably have used some technique for unloading the cargo more cautious than that employed, the ship would not be discharged from responsibility for an improper stow. *Hroncich* v. *American President Lines, Ltd.*, 334 F.2d 282, (C.A. 3, 1964); *Ferrante* v. *Swedish American Lines*, 331 F.2d 571 (C.A. 3, 1964); *Amador* v. *A/S J. Ludwig Mowinckels Rederi*, 224 F.2d 437 (C.A. 2, 1955); *Palazzolo* v. *Pan-Atlantic Steamship Corp.*, 211 F.2d 277 (C.A. 2, 1954). Accordingly, the court would have erred had it instructed the jury that "the fact that cargo is stowed in such a manner as to require the use of a pickup sling in order to discharge it does not render the vessel unseaworthy."

CONCLUSION

The instructions with respect to the issues between the plaintiff and defendant were, if anything, too favorable to the defendant. In an excess of cau-

tion, the court instructed upon contributory negligence and comparative fault (R. IV, 280-282) and submitted the case to the jury upon general verdict forms (R. IV, 270; R. I, 81-84), even though, as the court recognized, there was no evidence whatever of contributory negligence (R. IV, 261-263). The defendant's appeal, insofar as it challenges the judgment obtained by the plaintiff, is completely without merit and the judgment of the lower court should be affirmed.

Respectfully submitted,

POZZI, LEVIN & WILSON
RAYMOND J. CONBOY
Attorneys for Plaintiff-Appellee
Wayne Crawford.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

RAYMOND J. CONBOY
Attorney for Plaintiff-Appellee
Wayne Crawford.